Editor's Note: 102 I.D. 1

PITTSBURG & MIDWAY COAL MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 93-65 Decided February 16, 1995

Appeal from a decision of Administrative Law Judge John R. Rampton vacating Notice of Violation No. 91-02-116-2 on the basis that the Office of Surface Mining Reclamation and Enforcement had no authority to issue it. Hearings Division Docket No. DV 91-4-R.

Reversed; Notice of Violation No. 91-02-116-2 vacated on other grounds.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Enforcement Provisions--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

   Under the Surface Mining Control and Reclamation Act of 1977, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if a state fails to do so. Unless OSM has authority to enforce mining and reclamation standards when a state does not do so, there is no oversight.

2. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining

Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

Under 30 CFR 842.11(b)(1)(ii)(B)(2), both "appropriate action" and "good cause" are to be measured by whether the state regulatory authority's action or response to a 10-day notice is arbitrary, capricious, or an abuse of discretion under the state program. "Appropriate action" is defined at 30 CFR 842.11(b)(1)(ii)(B)(3), and 30 CFR 842.11(b)(1)(ii)(B)(4) lists five situations that will be considered "good cause" for the state regulatory authority to fail to take action to have a violation corrected.

3. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

OSM's oversight authority, as defined by statute, the regulations, and recent case law, requires rejection of the argument that the five situations listed in 30 CFR 842.11(b)(1)(ii)(B)(4) establish "good cause," per se, and preclude OSM from making any inquiry regarding the state response to a 10-day notice.

4. Regulations: Interpretation--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

In light of OSM's oversight responsibilities, a fair reading of the preamble to OSM's 1988 revision of its 10-day notice regulations dictates that OSM make some type of independent inquiry when the State regulatory authority is precluded by an administrative order from a state administrative body from acting on the possible violation, where that order is based on the violation not existing.

5. Regulations: Interpretation--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

The applicable standard of review to be applied by OSM in determining whether a decision or an order of a state administrative body that a violation does

not exist is good cause for failing to correct the violation is the arbitrary, capricious, or abuse of discretion standard, the same standard applicable to OSM review of state regulatory authority actions or responses. Such a decision or order would be arbitrary and capricious if it did not have a proper basis, and it would be an abuse of discretion if the administrative body were acting outside the scope of its authority under the state program in making such a ruling.

6. Surface Mining Control and Reclamation Act of 1977: Exemptions: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

   A determination by a state hearing officer to vacate a state notice of violation issued in response to a 10-day notice, which is based on the erroneous conclusion that the coal refuse area in question was exempt from state regulation, will be considered arbitrary and capricious, where, under the state program, no exemption is available.

7. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

   An interpretation of New Mexico Coal Surface Mining Commission Rule 80-1 § 20-72(d) that no designed diversion was necessary for the surface of a coal refuse area is not arbitrary, capricious, or an abuse of discretion and constitutes good cause for failing to have the alleged violation corrected.

APPEARANCES: Brock R. Wood, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface

Mining Reclamation and Enforcement; John A. Bachmann, Esq., Englewood, Colorado, for the Pittsburg and Midway Coal Mining Company.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a decision of Administrative Law Judge John R. Rampton vacating Notice of Violation (NOV) No. 91-02-116-2 issued by OSM pursuant to section 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(2) (1988), to the Pittsburg and Midway Coal Mining Company (P&M) for a State of New Mexico surface coal mining regulatory program violation at P&M's York Canyon underground coal mine in Colfax County, New Mexico. In the NOV, OSM alleged a "[f]ailure to divert surface runoff from a coal processing waste bank surface into stabilized diversion channel(s) designed to safely pass the runoff from a 100 yr., 24 hr. precipitation event," as required by certain state regulations. Judge Rampton vacated the NOV because he concluded that OSM had no authority to issue it. His conclusion was based on his interpretation of 30 CFR 842.11(b)(1)(ii)(B)(4)(iv), a provision of the 10-Day Notice (TDN) regulation under SMCRA, which provides that a state regulatory authority will be considered to have shown good cause for failing to have the alleged violation corrected where

> the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the violation, where that order

> is based on the violation not existing or where the temporary relief standards of sections 525(c) and 525(c) [sic] of the Act have been met.

Judge Rampton held that "a finding of 'good cause' is mandated in a case, such as this, where an administrative body of competent jurisdiction has concluded that no violation exists, regardless of whether the administrative body's decision has a proper basis in State law" (Decision at 7).

Procedural and Factual Background

The basic facts in this case are essentially undisputed. 1/ P&M owns the York Canyon Mine, which it operates under State permit No. 11-15P. Situated on the mine site is a coal processing waste disposal area referred to as Refuse Area No. 1, which, since 1973, has been the disposal site for a large amount of coarse refuse generated by the mining operation and which is the area in controversy in this case (Tr. 204-06; Exh. J-1).

On June 25, 1986, OSM conducted an oversight inspection of the York Canyon Mine (Tr. 215). In a report of that inspection, OSM noted that the State of New Mexico, Energy Minerals and Natural Resources Department, Mining and Minerals Division (MMD), the State regulatory authority, had issued NOV No. 276 on the same date to Kaiser Coal Corporation (Kaiser), P&M's predecessor-in-interest, citing, as violation No. 1 of 3, the failure to divert surface drainage from above Refuse Area No. 1 into stabilized

1/ See generally "Stipulation and Agreement As To Undisputed Facts," signed by counsel for the parties on Jan. 29, 1992.

diversion channels (Tr. 218; Exh. A-2; Exh. A-3). Kaiser failed to take the necessary action to correct that violation, and on July 15, 1987, OSM issued TDN No. 87-02-123-2 to MMD, citing, inter alia, a failure to direct surface drainage from the areas above Refuse Area No. 1. Subsequently, at MMD's insistence, Kaiser designed and constructed a stabilized diversion channel capable of carrying a 100-year, 24-hour precipitation event from the area above Refuse Area No. 1, to prevent runoff from the surrounding undisturbed area from coming into contact with the fill material in Refuse Area No. 1 (Tr. 204; Exh. R-3). Neither OSM's report of its 1986 oversight inspection, MMD's NOV, nor OSM's 1987 TDN contained any reference to a drainage problem concerning the fill surface area itself (Exh. A-2; Exh. A-3; Exh. R-3; Tr. 219, 343).

On July 31 and August 1, 1990, inspectors from the OSM Albuquerque Field Office (OSM-AFO), in the company of an MMD representative and a P&M employee, conducted a random oversight inspection of the mine and determined that certain conditions at Refuse Area No. 1 constituted a violation of the New Mexico regulatory program (Tr. 30; Exh. R-2). On August 1, 1990, OSM-AFO issued TDN No. 90-02-116-2 TV2 to MMD, alleging that P&M failed to divert runoff from the surface of Refuse Area No. 1 "into stabilized diversion channels designed to pass safely the runoff from a 100 yr., 24 hr. precipitation event" (Exh. R-1).

By letter dated August 13, 1990, the State replied to the TDN, asserting that the TDN had been issued in error because the violation cited had

already been addressed by TDN No. 87-02-123-2, dated July 15, 1987. The State maintained that the existing 100-year, 24-hour diversion channel was built to remedy the violation cited in the July 1987 TDN and that OSM had considered the resolution of the TDN to be appropriate. It further stated that during a May 26, 1988, oversite inspection, Refuse Area No. 1 was found to be in compliance (Tr. 51-52; Exh. R-3).

By letter dated August 21, 1990, OSM clarified for the State that the violation cited in the August 1990 TDN did not address the same violation that the 1987 TDN had cited. OSM-AFO informed the State that the July 1987 TDN was issued for P&M's failure to divert water running off of areas above the Refuse Area No. 1, whereas the August 1990 TDN was issued for failure to divert water from the surface of Refuse Area No. 1 itself (Tr. 55-57; Exh. R-4). This letter granted MMD 10 additional days in which to respond (Exh. R-4). The State responded by issuing NOV No. 495 to P&M on September 6, 1990, citing Coal Surface Mining Commission (CSMC) Rule 80-1 § 20-83(b), as the State regulation violated (Tr. 58-59; Exh. R-5). 2/

P&M requested review of NOV No. 495, and on November 2, 1990, an MMD hearing officer convened a hearing in Santa Fe, New Mexico (Tr. 60-62). Representatives of OSM-AFO, P&M, and MMD attended (Tr. 61).

2/ Appended to P&M's Post-Hearing Brief is a copy of relevant portions of CSMC Rule 80-1. Section 20-83(b) of that Rule states: "All surface drainage from the area above the coal processing waste bank and from the crest and face of the waste disposal area shall be diverted, in accordance with 20-72(d)." All quotations to sections of Rule 80-1 found in this opinion are taken from the copy of Rule 80-1 provided by P&M, except the quote of § 9-12, which is from a copy of that regulation provided by OSM in an appendix to its Response to Applicant's Motion for Summary Decision, filed with the Hearings Division on Oct. 30, 1991.

On November 9, 1990, the hearing officer issued his written decision vacating the State NOV. He held that Refuse Area No. 1 complied with performance criteria, and, in any event, because it was an "existing structure," under CSMC Rule 80-1, § 9-12, it was exempt from the design requirements of § 20-72(d) (Exh. R-6). MMD did not seek further review of that ruling.

By letter dated November 27, 1990, OSM-AFO informed MMD that it deemed the hearing officer's vacation of the State NOV to be "inappropriate" and the hearing officer's decision to be "without merit."

By letter dated December 4, 1990, MMD requested informal review of OSM-AFO's determination, charging that it initially took appropriate action when it issued NOV No. 495; that the hearing officer's decision provided good cause for not taking further action; that OSM-AFO failed to evaluate the decision under the arbitrary, capricious, or abuse of discretion standard; that there was no convincing evidence to refute the hearing officer's decision; and that OSM abused its oversight authority in issuing the NOV (Tr. 71-72; Exh. R-8).

In his informal review decision, dated February 1, 1991, the OSM Deputy Director, Operations and Technical Services, concluded that the MMD hearing officer's decision constituted an abuse of discretion and negated the appropriate action taken by MMD in issuing the NOV. The

Deputy Director denied the State request that the TDN be withdrawn and ordered another Federal inspection of the mine (Tr. 73-74; Exh. R-9).

On February 12, 1991, OSM conducted the reinspection of the mine and issued the NOV in question (Exh. R-10). P&M sought review of that NOV. Following a hearing, Judge Rampton issued his decision vacating the NOV. 3/

Judge Rampton's Decision

Judge Rampton vacated the NOV on procedural grounds, concluding that OSM had no authority under the Federal TDN process set forth at 30 CFR 842.11 to conduct the inspection resulting in the issuance of the NOV or to issue the NOV. He stated:

> The provisions of 30 CFR 842.11 prescribe the procedures that must be followed and the requirements that must be met before OSM may exercise its enforcement powers and issue a Federal notice of violation in a case, such as this, where the surface mining operation in question is located in a state that has primacy under SMCRA. According to § 521(a)(1) of SMCRA and 30 CFR 842.11, if a state regulatory authority, in response to a ten-day notice issued by OSM, takes appropriate action to cause the violation to be corrected or shows good cause for failing to take appropriate action, OSM's duty to inspect a site is not implicated and OSM is precluded from taking further action on the alleged violation. As noted in the Federal Register:
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> > The issue under section 521(a)(1) * * * is not whether authority exists for a federal inspection, but whether the state has shown good cause so as not to trigger the

3/ Administrative Law Judge Ramon M. Child conducted the hearing in this case on Feb. 4 and 5, 1992, in Albuquerque, New Mexico. However, Judge Rampton rendered the decision due to Judge Child's reassignment to other duties.

> Secretary's obligation to inspect. * * * If a state has good cause, then OSMRE's obligation to inspect a site, other than through oversight inspections or in cases of imminent harm, has not come into being.

53 FR 26728, 26737 (July 14, 1988).

Good cause is defined to include a situation where:

> [T]he State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 525(c) [sic] of the Act have been met.

30 CFR 842.11(b)(1)(ii)(B)(4)(iv) (1991) (the "good cause regulation").

(Decision at 2).

He held that the MMD hearing officer constituted an "administrative body of competent jurisdiction" as contemplated by the "good cause" regulation, and that the parties' arguments concerning whether the MMD hearing officer's decision was an abuse of discretion were irrelevant, as 30 CFR 842.11(b)(1)(ii)(B)(4)(iv) contemplates no Federal oversight of a decision by an "administrative body of competent jurisdiction" that a violation does not exist. Specifically, he stated:

> I thus hold that a finding of "good cause" is mandated in a case, such as this, where an administrative body of competent jurisdiction has concluded that no violation exists, regardless of whether the administrative body's decision has a proper basis

> in state law. It is not necessary, and, in fact, contrary to the regulations, to assess the evidence de novo to determine whether the State administrative body had a proper basis for concluding that a violation did not exist.

(Decision at 7).

Judge Rampton concluded that MMD had good cause for failing to take appropriate action to cause the alleged violation to be corrected and, therefore, that OSM had no authority to issue the NOV.

Arguments of the Parties

OSM initially assigned two grounds for appeal, arguing that (1) "[t]he New Mexico informal conference hearing officer did not constitute an administrative body of competent jurisdiction under 30 CFR 842.11(b)(1)(ii)(B)(4)(iv)," and (2) "[t]he decision of an administrative body of competent jurisdiction is not per se good cause simply because the administrative body concluded the violation does not exist, but is subject to de novo review to determine if the administrative body's decision has a proper basis in State law" (Brief on Appeal at 13, 16).

In its Reply Brief, however, OSM abandoned its argument that the New Mexico hearing officer did not constitute an "administrative body of competent jurisdiction," and it changed the focus of its second argument. It asserted that "[t]he determinative issue in this case is whether the

'good cause' criterion enumerated under 30 CFR 842.11(b)(1)(ii)(B)(4)(iv) is independent of or subject to a determination under 30 CFR 842.11(b)(1)(ii)(B)(2) that the State response was arbitrary, capricious, or an abuse of discretion" (Reply Brief at 2). 4/

OSM argues that Judge Rampton's decision is "based upon an untenable interpretation of the July 14, 1988 OSM preamble," and "conflicts with and undermines the Federal oversight process" (Reply Brief at 16). OSM argues that 30 CFR 842.11(b)(1)(ii)(B)(4)(iv) cannot be applied independently of 30 CFR 842.11(b)(1)(ii)(B)(2), which requires that state action, in order to be appropriate under section 521 of SMCRA, meet a standard of conduct that is not arbitrary, capricious, or an abuse of discretion.

P&M, on the other hand, contends that "[t]he Decision is fully supported by the plain meaning of 30 CFR 842.11 and is consistent with the SMCRA concepts of primacy and Federal oversight of State programs" (Answer at 8). In its Sur-Reply Brief, P&M sets forth its analysis of 30 CFR 842.11(b)(1)(ii)(B) and concludes that when a state regulatory authority receives a TDN and its response is one of those responses delineated in 30 CFR 842.11((b)(1)(ii)(B)(4), it has, by definition, shown good cause for its failure to cause the alleged violation to be corrected. It continues:

> The Preamble unequivocally establishes that the five situations delineated in clause (B)(4) constitute per se instances of

4/ By order dated Apr. 13, 1993, we granted OSM leave to file its Reply Brief over objection of P&M, "in the absence of a showing of any substantial prejudice." P&M presented no such showing in its Sur-Reply Brief.

> "good cause." When a State regulatory authority relies on one of those situations as the basis for its failure to cause a possible violation cited in a ten-day notice to be corrected, OSM is mandated to consider the response of the State regulatory authority per se "good cause" and the ten-day notice is concluded without further inquiry. [Emphasis in original.]

(Sur-Reply Brief at 9).

P&M asserts that there is no support for OSM's attempt in its Reply Brief to impose the arbitrary, capricious, or abuse of discretion standard of 30 CFR 842.11(b)(1)(B)(2) on actions of an "administrative body or court of competent jurisdiction" under 30 CFR 842.11(b)(1)(B)(4)(iv). The clause (B)(2) standard, P&M contends, "does nothing more than define the minimum acceptable response of the State regulatory authority" and is not applicable to state adjudicatory functions, while clause (B)(4) lists situations that are mandated to be considered "good cause" by OSM (Sur-Reply Brief at 7).

OSM's Oversight Authority

[1] A reasoned analysis of Judge Rampton's decision in light of the parties' arguments concerning the 1988 amendments to 30 CFR 842.11(b)(1)(ii)(B) cannot be accomplished without reference to the legislative mandate which Congress impressed upon OSM in endowing it with oversight authority of state programs.

Section 503(a) of SMCRA, 30 U.S.C. § 1253(a) (1988), granted the states the authority to establish "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 1271 and 1273 of this title * * *." Thus, states that desire "exclusive" jurisdiction over the regulation of surface coal mining and reclamation operations may acquire it as provided in section 1253(a), subject, however, to two sections of SMCRA: section 1271, the enforcement section, and section 1273, the Federal lands program section, which provides for state cooperative agreements. See Southern Ohio Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 20 F.3d 1418, 1424 (6th Cir. 1994).

The oversight role was specifically embodied in section 521(a)(1) of SMCRA, 30 U.S.C. § 1271 (1988), which requires Federal oversight of state regulatory authorities by authorizing Federal inspection of surface coal mining operations if a state regulatory authority fails to take appropriate action to cause a violation to be corrected or to show good cause for such failure within 10 days after receipt of notice from OSM that a violation exists. Consequently, under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so. See Annaco, Inc. v. Hodel, 675 F. Supp. 1052, 1056-57 (E.D. Ky. 1987); see also Annaco, Inc. v. OSM, 119 IBLA 158, 162-64 (1991). "The fact that a mine is located in a

primacy state is irrelevant to OSM's duties under section 1271." Southern Ohio Coal Co. v. OSM, supra at 1424. 5/

Having examined the legislative mandate imposed upon OSM in the form of its oversight authority, we now turn to the regulatory amendments to the TDN rule adopted by OSM effective August 15, 1988.

OSM's TDN Rule and its 1988 Amendments

[2] Departmental regulations found at 30 CFR 842.11 are adopted pursuant to section 521(a)(1), 30 U.S.C. § 1271(a)(1) (1988), and implement OSM's oversight enforcement authority over state programs. Effective August 15, 1988, OSM amended 30 CFR 842.11(b)(1)(ii)(B), with the stated objective of establishing "a uniform standard by which OSMRE will evaluate state responses to federal notices of possible violations of the Surface Mining Act." 53 FR 26728 (July 14, 1988). The regulation at 30 CFR 842.11(b)(1)(ii)(B)(1) provides, in pertinent part, that an authorized representative of the Secretary shall immediately conduct a Federal inspection when that representative has reason to believe on the basis of information available to him or her that a violation exists and

> [t]he authorized representative has notified the state regulatory authority of the possible violation and more than ten days have

5/ In Annaco, Inc. v. Hodel, supra at 1053-57, the district court set forth in considerable detail the basis for and nature of OSM's oversight jurisdiction in a primacy state.

> passed since notification and the State regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response. After receiving a response from the State regulatory authority, before inspection, the authorized representative shall determine in writing whether the standards for appropriate action or good cause for such failure have been met.

Under 30 CFR 842.11(b)(1)(ii)(B)(2), both "appropriate action" and "good cause" are to be measured by whether the state regulatory authority's action or response to a TDN is arbitrary, capricious, or an abuse of discretion under the state program. 6/ "Appropriate action" as defined at 30 CFR 842.11(b)(1)(ii)(B)(3), and 30 CFR 842.11(b)(1)(ii)(B)(4) "lists five situations that will be considered 'good cause' for the state regulatory authority to fail to take action to have a violation corrected." 53 FR 26735 (July 14, 1988). 7/ 30 CFR 842.11(b)(1)(ii)(B)(4) states:

> Good cause includes: (i) Under the State program, the possible violation does not exist; (ii) the State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist; (iii) the State regulatory authority lacks jurisdiction under the State program over the possible violation or operation; (iv) the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that

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6/ The regulation states:

"(2) For purposes of this subchapter, an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so."

7/ Prior to 1988, OSM had not defined either "appropriate action" or "good cause for failure to act" for purposes of section 521(a)(1), relying solely upon its discretion to determine whether the state had acted appropriately on a case-by-case basis. See W. E. Carter, 116 IBLA 262, 267 (1990). The 1988 regulations still permit this determination to be made on a case-by-case basis, but circumscribe OSM's discretion by defining these terms. See R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 145-46 n.5 (1991).

> order is based on the violation not existing or where the temporary relief standards of section 525(c) or 525(c) [sic] of the Act have been met; or (v) with regard to abandoned sites as defined in § 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.

OSM's TDN rule at 30 CFR 842.11(b)(1) was challenged in the United States District Court for the District of Columbia by the National Wildlife Federation and other organizations interested in conservation, the environment, and the effects of coal mining. 8/ In a decision styled, National Coal Association v. Uram, No. 87-2076 et al. (D.D.C. Sept. 16, 1994), the court concluded at 19 that OSM's "new TDN regulations are not arbitrary, capricious, or otherwise inconsistent with law. Rather they are based on

a permissible interpretation of SMCRA and they should be upheld. Chevron [U.S.A., Inc. v. NRDC], 467 U.S. [837] at 843, 104 S.Ct. [2778] at 2782 [(1984)]."

Discussion

[3] The initial issue in this case is whether, as argued by P&M, the five situations listed in 30 CFR 842.11(b)(1)(ii)(B)(4) establish "good cause" per se and must be accepted by OSM without inquiry as good cause for failure to have a violation corrected. Clearly, that is not the case.

8/ In consolidated proceedings, the National Coal Association and other organizations associated with the coal mining industry challenged a decision of the Director of OSM to deny a portion of a petition for rulemaking which sought to repeal 30 CFR 843.12(a)(2).

Under 30 CFR 842.11(b)(1)(ii)(B)(4)(i), "good cause" includes: "[u]nder the State program, the possible violation does not exist." Thus, P&M would assert that where OSM issues a TDN, and the State regulatory authority responds that the violation does not exist, OSM must accept that determination. OSM's oversight authority, as defined by statute, requires otherwise, as do the regulations and recent case law.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). For regulations which are promulgated to carry out a statute to be valid, they must be consistent with the statute under which they are promulgated. Ashton v. Pierce, 716 F.2d 56, 60 (D.C. Cir. 1983). "An administrative agency, possessing power delegated by the legislative branch of government, must comply with the legislative requirement that its decisions be reasoned and in accordance with the purposes for which power has been delegated." State Farm Mutual Auto Insurance Co. v. Department of Transportation, 680 F.2d 206, 208 (D.C. Cir. 1982). P&M has stated in its Sur-Reply Brief, citing Campesinos Unido, Inc. v. United States Department of Labor, 803 F.2d 1063 (9th Cir. 1986), "IBLA's task is to interpret a regulation as a whole, in light of the overall statutory and regulatory scheme, and not give force to one phrase in isolation" (Sur-Reply Brief at 13).

As OSM has pointed out, acceptance of the position taken by P&M fails to give credence to other aspects of the regulatory scheme, also the

subject of comment in the preamble, which provide for an overall balance to OSM's process of analysis under the statutory and regulatory schemes pertaining to its oversight authority. We, therefore, conclude that the Board must construe regulations promulgated by OSM in a manner consistent with the statutory purposes they are designed to implement.

Acceptance of P&M's argument regarding clause (B)(4) would mean abdication of OSM's oversight responsibilities, something not contemplated by the Department when it stated in the 1988 rulemaking in discussing clause (B)(4)(i) that "[a]fter issuing a ten-day notice, OSMRE independently determines whether a state has taken appropriate action or shown good cause for such failure, based on the state response" (emphasis added) (53 FR 26736 (July 14, 1988)).

In National Coal Association v. Uram, supra at 24-25, the court stated, regarding clause (B)(4)(i):

> The first category of "good cause" established under the regulation encompasses those situations where the state regulatory authority asserts that the "possible violation" does not exist under the approved state program. 30 CFR § 842.11(b)(ii)(B)(4)(i) (1988). Here, OSM will defer to the state's decision that no violation exists unless OSM determines that the state conclusion is arbitrary, capricious or an abuse of discretion. 53 Fed. Reg. 26,735 (1988). [Emphasis added.]

Accordingly, we find no support for P&M's position that OSM must accept as "good cause," without inquiry, all the situations set forth

in clause (B)(4).

[4] We turn now to the question of what inquiry OSM may make under clause (B)(4)(iv) when "the State regulatory authority is precluded by an administrative * * * order from an administrative body * * * from acting on the possible violation, where that order is based on the violation not existing." Judge Rampton held that no inquiry whatsoever by OSM is allowed, basing his conclusion on the language of the regulations and the 1988 preamble. 9/ P&M supports Judge Rampton's decision in this regard. 10/ OSM asserts in its Brief on Appeal at 18 that such an order by an administrative body is subject to OSM's de novo determination regarding whether it "has a proper basis in State law." However, in its Reply Brief at 2, OSM states that

> its use of the term "de novo" regarding OSM's and OHA's [Office of Hearings and Appeals] review of New Mexico's response to Ten-Day Notice No. X-90-2-116-2-TV2 (TDN) may have been misleading, if that term is construed to mean that no deference should be shown to the State hearing officer's decision. Under the Federal

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9/ Judge Rampton stated:

"It is important to note that the arguments of both parties regarding the question of whether the Hearing Officer's decision is arbitrary or capricious are irrelevant to the determination of whether the Hearing Officer's decision constitutes 'good cause.' Each party has incorrectly assumed that the Hearing Officer's decision cannot constitute 'good cause' if it is so poorly reasoned as to be arbitrary or capricious. Both the text of the 'good cause' regulation and the preamble show that the Hearing Officer's decision - an order from an administrative body of competent jurisdiction precluding the State regulatory authority from acting on the possible violation, which order is based on the violation not existing is not to be examined to determine whether it is arbitrary or capricious" (Decision at 5).

10/ P&M does take exception to Judge Rampton's statement at page 7 of his Decision that under clause (B)(4)(iv) OSM may engage in a de novo evaluation of whether the temporary relief standards were met. P&M finds that statement to be immaterial in this case since no temporary relief order is involved. However, it makes clear that its position is that no such independent determination by OSM is permitted under the regulations (Sur-Reply Brief at 10, n.7).

> regulations at 30 C.F.R. § 842.11(b), State hearing officer decisions--like other State responses to a TDN--are reviewed under a deferential "arbitrary, capricious, or abuse of discretion" standard.

We disagree with Judge Rampton that the language of 30 CFR 842.11(b)(1) itself clearly dictates the result that he reached. While we admit that certain portions of the preamble may be selectively cited to support his conclusion, we believe that a fair reading of the preamble in light of OSM's oversight responsibilities requires that OSM make some type of independent inquiry when an administrative order, such as that issued in this case, is present.

Having concluded that OSM has the authority to conduct an independent inquiry into the action of the "administrative body," we must determine the standard that should govern that inquiry.

[5] The preamble to clause (B)(4)(iv) states that "a state regulatory authority has good cause for not taking action when it is enjoined from doing so by a state administrative or judicial body acting within the scope of its authority under the state program." 53 FR 26739 (July 14, 1988). Also, "good cause exists for the regulatory authority not acting only where the order has a proper basis." 11/ Id. Thus, it appears that what OSM

11/ The preamble continues by stating: "Such a basis would exist * * * if the state court concluded that the violation does not exist." 53 FR 26739 (July 14, 1988). While this could be read, as Judge Rampton did, to limit any inquiry by OSM, we believe that this statement must be considered in the overall context of the regulations which indicates an intent to retain the assigned oversight role, while deferring to the states.

requires of the state is that the administrative or judicial body be "acting within the scope of its authority under the state program" and that the decision or order have a "proper basis." There is no indication that OSM intended to conduct a de novo review of all the evidence presented to the administrative or judicial body and make an independent determination. As stated by the court in National Coal Association v. Uram, supra at 20:

> The federal government's role is one of oversight. The due deference Congress intended the states be accorded under SMCRA is analogous to the deference accorded executive agencies given primary responsibility for the imple agency's action is arbitrary and capricious. See 5 U.S.C. § 706 (1988).

We conclude that the applicable standard of review to be applied by OSM in determining whether a decision or an order of a state administrative body that a violation does not exist is good cause for failure to correct a violation is the arbitrary, capricious, or abuse of discretion standard, the same standard applicable to OSM review of state regulatory authority actions or responses. Thus, OSM is required to defer to the ruling of the state administrative body that no violation exists, unless it determines that the ruling is arbitrary, capricious, or an abuse of discretion of the state program. 12/ Such a ruling would be arbitrary and capricious if it

12/ P&M argues that principles of collateral estoppel and res judicata apply to prevent OSM from exercising its oversight authority under the facts of the case. However, the Board has repeatedly held that the doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own notices of violation and/or cessation orders in situations where similar notices and/or orders have been issued and litigated by a state regulatory authority, because the statutory scheme of SMCRA evidences

did not have a proper basis, and it would be an abuse of discretion if the administrative body were acting outside the scope of its authority under the state program in making such a ruling. 13/

The State Hearing Officer's Decision

The hearing officer concluded that no violation existed because Refuse Area No. 1 complied with the performance standards and was exempt from design standards under the state program. For the following reasons, we conclude that the hearing officer's decision in this case is arbitrary and capricious because it does not have a proper basis in the state program.

The alleged violation in this case, although apparently existing for a number of years, was never brought to MMD's attention by OSM by the issuance of a TDN until 1990, despite the fact that OSM routinely conducted oversight inspections of the mine. Robert Russell, Bureau Chief of the Coal Mine Reclamation Bureau, MMD, testified that some time shortly before

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fn. 12 (continued)
a countervailing statutory policy against application of those doctrines in such a situation. R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 148 (1991); Annaco, Inc. v. OSM, 119 IBLA 158 (1991), aff'd Annaco, Inc. v. Hodel, 675 F. Supp. 1052 (E.D. Ky. 1987); Slone v. OSM, 114 IBLA 353, 356-57 (1990). However, as indicated, OSM may not ignore such state action where it is relied upon by a state in response to a TDN. OSM must evaluate that action under the deferential standard.

13/ OSM has requested that if we rule in its favor that arbitrary, capricious, and abuse of discretion is the proper standard, we remand the matter to the Hearings Division "for a decision on the issue of whether the decision of [the] New Mexico informal conference hearing officer was arbitrary, capricious, or an abuse of discretion, as judged by the State program" (Reply Brief at 10). While we find that Judge Rampton erred in his interpretation of 30 CFR 842.11(b)(ii)(B)(4)(iv), we do not believe it is necessary to remand the case for further consideration. All the evidence has been presented and the case is ripe for final decision. Accordingly, we continue our analysis.

issuance of the 1990 TDN he was made aware through discussions with Steve Rathbun, Chief, Inspection and Enforcement, AFO-OSM, and/or Henry Austin, the OSM inspector who later issued the TDN and the NOV, that OSM's position was that a designed channel draining the surface of Refuse Area No. 1 needed to be in place, in addition to the one already in place that drained the area above Refuse Area No. 1 (Tr. 332-33, 364-67). He further stated that "[w]hen the questions were brought up to me in an informal nature, it, to be very truthful, it became quite confusing to me as to exactly what we were talking about here, because our Regulation, in the second sentence, didn't require design" (Tr. 367). 14/ Thus, following receipt of the TDN, Russell responded to OSM in a letter dated August 13, 1990, that the alleged violation had previously been addressed by the construction of the diversion channel above the fill (Exh. R-3). OSM found that response to be inappropriate in a letter dated August 21, 1990, explaining that the area

14/ The regulation referred to by Russell is one cited in the TDN and the NOV, CSMC Rule 80-1, § 20-72(d), which states:

"Surface water runoff from the area above the fill shall be diverted away from the fill and into stabilized diversion channels designed to pass safely the runoff from a 100-year, 24-hour precipitation event or larger event specified by the Director. Surface runoff from the fill surface shall be diverted to stabilized channels off the fill which will safely pass the runoff from a 100-year, 24-hour precipitation event. Diversion design shall comply with the requirements of Section 20-43(f)." (Emphasis supplied). Russell's reference is to the absence in the second sentence of the words "designed to pass safely," which appear in the second sentence.

On the other hand, the comparable OSM regulation, 30 CFR 817.72(a)(2), provides: "Runoff from the areas above the fill and runoff from the surface of the fill shall be diverted into stabilized diversion channels designed to meet the requirements of § 817.43 and to safely pass the runoff from a 100-year, 6-hour precipitation event." (Emphasis supplied.)

Thus, in the OSM regulation, the design requirement applies to drainages from both areas.

of concern was not the area above the fill, but the fill surface itself (Exh. R-4). Russell explained that after much discussion within MMD, it was decided that a State NOV would be issued, even though we "still did not believe that a design channel was absolutely necessarily required" (Tr. 378-80).

Upon receipt of NOV 495, P&M sought review by MMD. The MMD hearing officer vacated NOV 495. OSM-AFO informed MMD that it deemed the hearing officer's vacation of the State NOV to be "inappropriate," and the hearing officer's decision to be "without merit." However, that letter contained no analysis or rationale for its conclusion. The Deputy Director's decision did contain some rationale for OSM's finding, but it did not discuss what we consider to be the critical flaw in the hearing officer's decision, his improper construction of CSMC Rule 80-1, § 20-81(b).

In his decision the hearing officer noted that while MMD believed that Refuse Area No. 1 met the applicable performance standards, it took the position before him that the area did not meet the requirements for a CSMC Rule 80-1, § 9-12 exemption, which allowed certain pre-existing structures to escape reconstruction under permanent program design requirements. 15/

15/ CSMC § 9-12 provides, in pertinent part:

"(a) Each [permit] application shall contain a description of each existing structure proposed to be used in connection with or to facilitate the surface coal mining operation and reclamation operation. The description shall include -

* * * * * * *

"(4) A showing, including relevant monitoring data or other evidence, whether the structure meets the performance standards of Chapter K of these rules and regulations.

He stated that MMD's belief was based on the language of CSMC Rule 80-1, § 20-81(b), which he set forth in his decision as follows:

> [(b)] All coal processing waste other than wastes to be disposed of in the mine workings or excavation, shall be hauled or conveyed and placed in new and existing disposal areas approved by the Director for this purpose. These areas shall be within a permit area. The disposal area shall be designed, constructed and maintained -
>
> > (1) In accordance with Sections 20-71 and 20-72, this Section, and Sections 20-82 through 20-88 of these rules and regulations; and
> >
> > (2) To prevent combustion. [16/]

Id.

The hearing officer rejected MMD's position: "I do not interpret this section as precluding the exemption" provided for in § 9-12. Id. The basis for his interpretation that the exemption applied to Refuse Area No. 1 was his faulty conclusion that under state regulations the exemption was available for all waste disposal areas, except for coal processing waste dams and embankments. Thus, he stated:

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fn. 15 (continued)

"(b) Each [permit] application shall contain a compliance plan for each existing structure which does not meet the performance standards of chapter K and which is proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan shall include -

"(1) Design specifications for the modification or reconstruction of the structure to meet the design and performance standards of Chapter K

* * *"

(Emphasis supplied).

16/ The hearing officer actually referred to this language in his decision as "Section 20-81(a)." However, the language he quoted is that of § 20-81(b). The hearing officer's reference is clearly a typographical error.

> Section 9-12 of CSMC Rule 80-1 is almost identical to 30 CFR Section 701.11(e). Both rules have not been revised since they were promulgated. The March 13, 1979, Federal Register discusses the federal rule and a copy of those pages which apply to Section 701.11(e) are attached.
>
> One quote from this Federal Register summarizes these discussions. "In essence, if the existing structure complies with the permanent program performance standards, the applicant need not reconstruct the structure in order to comply also with the permanent program design requirements." [44 FR 14944 (Mar. 13, 1979).]

Although not expressly pointed out by the OSM Deputy Director, the hearing officer's rationale was flawed because of his reliance on 30 CFR 701.11(e) (1979) for his interpretation of the scope of CSMC Rule 80-1, § 9-12. Although he stated that "[b]oth rules have not been revised since they were promulgated," 30 CFR 701.11(e) (1979) was, in fact, significantly revised in 1983.

In 1979, 30 CFR 701.11(e) provided for an exemption for existing structures which met the performance standards of the regulations, but not the design requirements. However, under 30 CFR 701.11(e)(2)(i) (1979) that exemption did not apply to "[t]he requirements for existing and new waste piles used either temporarily or permanently as dams or embankments." (Emphasis added.) Thus, it is understandable that, upon reliance on that language, the hearing officer might interpret CSMC Rule 80-1, § 20-81(b) as imposing a restriction only on use of the exemption for those waste areas used as dams or embankments.

However, in 1983, the Department revised 30 CFR 701.11(e) and eliminated the pre-existing structure exemption for all waste facilities, not just for waste piles used as dams or embankments. 48 FR 44344, 44391 (Sept. 28, 1983). 17/ Accordingly, the hearing officer's rationale for ignoring § 20-81(b) has no basis in the applicable Federal regulation. The applicable Federal regulation does not allow exemptions for waste facilities. In addition, as recognized by the Deputy Director in his decision, "[t]he New Mexico program does not contain a similar exclusion." 18/ While this is an inconsistency between the Federal regulations and the New Mexico state program, it is not significant in this case because the violation at issue is not based on a state regulation corresponding to 30 CFR 701.11(e)(2)(i). It is based on a violation of the CSMC Rule 80-1 regulations cited in the NOV, §§ 20-83(b), 20-72(d), 20-71, and 20-43(f).

Although OSM argues that § 20-81(b) is controlling in that it requires that new and "existing" disposal areas be "designed, constructed, and maintained," the design, construction, and maintenance is to be conducted in accordance with, inter alia, § 20-72. In this case, the question is

17/ In that rulemaking the Department expressly stated that the exemption did not apply to "[T]he requirements for existing and new coal mine waste disposal facilities." 48 FR 44391 (Sept. 28, 1983). It also redesignated the regulation as 30 CFR 701.11(d)(2)(i). However, it was again redesignated as 30 CFR 701.11(e)(2)(i) in 1984. 49 FR 38477 (Sept. 28, 1984).
18/ In a Jan. 11, 1991, memorandum to OSM Headquarters in response to a request for the justification for finding the hearing officer's decision to be without merit, the AFO-OSM Chief, Inspection and Enforcement, stated: "A review of New Mexico's approved program reveals that no counterpart to this Federal regulation [30 CFR 701.11(e)(2)(i)] exists" (Exh. A-1).

whether § 20-72(d) requires that Refuse Area No. 1 meet design criteria. If so, there was a violation. If not, no violation exists. We address that question next.

Was There a Violation of State Regulations?

The first regulation cited in the NOV, CSMC Rule 80-1, § 20-83 pertains to water control measures for coal processing waste banks. Paragraph (b) of that regulation requires that all surface drainage from above a waste disposal area, and from the crest and face of a waste disposal area, be diverted in accordance with § 20-72(d). Section 20-72(d) provides:

> Surface water runoff from the area above the fill shall be diverted away from the fill and into stabilized diversion channels designed to pass safely the runoff from a 100-year, 24-hour precipitation event or larger event specified by the Director. Surface runoff from the fill surface shall be diverted to stabilized channels off the fill which will safely pass the runoff from a 100-year, 24-hour precipitation event. Diversion design shall comply with the requirements of Section 20-43(f).

Section 20-43(f) sets forth specific requirements for diversion design.

[7] There is no dispute between the parties that a designed diversion has not been installed by P&M to carry away runoff from the fill surface of Refuse Area No. 1. P&M argues, however, that § 20-72(d) does not require

the installation of designed diversion channels to remove runoff from the fill surface and that the surface runoff from the fill surface of Refuse Area No. 1 is being effectively directed by grading off the fill. 19/

P&M environmental supervisor Michael Coats testified that naturally occurring channels are already present at Refuse Area No. 1 in the form of "fractured bedrock" beneath the area (Tr. 230). He testified that water flowing north off the fill surface first collects on an area north of the deposited coarse refuse and then passes out of the area by soaking into the ground and flowing through the fractured bedrock under Refuse Area No. 1 (Tr. 320-21). It was Coats' opinion that the fractured bedrock constituted a channel under the meaning of the state program, and that grading of the refuse area was sufficient to meet the requirement of § 20-72(d) (Tr. 322-23). This was an opinion shared by MMD's Russell (Tr. 402-03). Thus, it is clear that, absent OSM's insistence, MMD would not have issued the NOV.

OSM believes that the second sentence of this regulation requires P&M to divert the water running off the fill surface in diversion channels designed in accordance with the requirements of § 20-43(f). P&M however,

19/ It is clear from the record that although MMD cited P&M with a violation for failure to divert water from the fill surface, it did so for various reasons, none of which was a belief that designed diversion channels were necessary (Tr. 378-80). In fact, the remedial action required by MMD's NOV 495, was merely submission of a mitigation plan to "grade the refuse material (fill surface) to drain off precipitation away from the fill" (Exh. R-6). The hearing officer's determination that performance standards were met regarding the fill and that it was properly graded, stable, and exhibited no erosion problems satisfied any concerns by MMD. Moreover, these findings were not disputed by OSM.

argues that the second sentence of § 20-72(d) requires only that water running off the fill surface be diverted into "stabilized channels," not "stabilized designed diversion channels," capable of passing the specified precipitation event from the area (Applicant's Posthearing Brief at 31).

The language of § 20-72(d) corresponds to language found in the 1979 version of the Federal regulations at 30 CFR 817.72(d), and OSM points to preamble language in that 1979 rulemaking in support of its position that designed diversions are required. 20/ It does not address, however, why it was necessary to amend the regulations in 1983 and change that language to what now appears in 30 CFR 817.72(a)(2), if the requirement were always so clear. 21/

Although OSM changed its regulations in 1983, no comparable change was required of § 20-72(d) of New Mexico's state program. While it could be argued that no change was necessary because no substantive change was made

20/ The 1979 regulations provided at 30 CFR 817.83(b) that "[a]ll surface drainage from the area above the coal processing waste bank and from the crest and face of the waste disposal area shall be diverted in accordance with Section 817.72(d)." 30 CFR 817.72(d) (1979) contained language identical to § 20-72(d), except for necessary changes in citation. Those 817.83 regulations governed "Coal processing waste banks: Water control measures," while the 817.72 regulations established requirements for "Disposal of underground development waste and excess spoil: Valley fills."

21/ The 1983 rulemaking provided the present language of 30 CFR 817.72(a)(2): "Runoff from the areas above the fill and runoff from the surface of the fill shall be diverted into stabilized diversion channels designed to meet the requirements of § 817.43 and to safely pass the runoff from a 100-year, 6-hour precipitation event." At the same time, the "Coal mine waste: refuse pile" regulations at 30 CFR 817.83(a)(2) were amended to add virtually the identical requirement, substituting only the words "refuse pile" for the word "fill."

to the regulation, we reject that argument. If OSM is to insist on comparable regulatory interpretation by the states, then the comparable regulations should contain the same wording. It is patently obvious from this case that a change of the wording of a regulation can cause reasonable people to differ over the consequences.

We conclude that no violation existed because MMD's original interpretation of § 20-72(d) that no designed diversion was necessary for the surface of Refuse Area No. 1 was not arbitrary, capricious, or an abuse of discretion. Accordingly, MMD has shown good cause for failing to have the alleged violation corrected. 22/ The NOV is vacated.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we reverse Judge Rampton's decision and vacate the NOV on other grounds.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

David L. Hughes
Administrative Judge

22/ In National Coal Association v. Uram, supra at 26, the court stated:

"If a state's program does not comply with federal standards, there is a remedial process. The 30 C.F.R. § 732.17(e) process is designed to authorize the Secretary to require amendments of approved state programs if circumstances warrant as a result of oversight inspections."

This is a case in which it appears that it would have been productive for OSM to have attempted to resolve its policy differences with MMD regarding enforcement of § 20-72(d) prior to issuance of the TDN and NOV.